14. Admitted in part. It is admitted that Highmark provided Plaintiffs' counsel with a copy of Plaintiff's benefits program booklet. After reasonable investigation, Highmark is without knowledge or information sufficient to form a belief as to the truth of the remaining averments set forth in Paragraph 14 of Plaintiff's Complaint.

15. After reasonable investigation, Highmark is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in Paragraph 15 of Plaintiff's Complaint.

16. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in Paragraph 16 of Plaintiff's Complaint.

17. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in Paragraph 17 of Plaintiff's Complaint.

18. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in Paragraph 18 of Plaintiff's Complaint.

19. Admitted.

COUNT I

Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1132(a)(1)(B)

20. In that Paragraph 20 of Plaintiff's Complaint incorporates by reference Paragraphs 1 through 19 thereof, Highmark incorporates herein its responses thereto as set forth hereinabove.

21. The averments set forth in Paragraph 21 of Plaintiff's Complaint are conclusions of law to which no response is required. To the extent that such averments constitute averments of fact, the averments therein that "Plaintiffs are entitled to recover benefits due them under the terms of the plan, to enforce the rights under the terms of the plan, and to clarify the rights to future benefits under the terms of the plan" are denied.

22. Admitted.

23. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in Paragraph 10 of Plaintiff's Complaint.

24. The averments set forth in Paragraph 24 of Plaintiff's Complaint are conclusions of law to which no response is required. To the extent that such averments constitute averments of fact, the averment therein that Highmark "has failed to pay the Plaintiffs the sum of money due under the policy" is denied.

COUNT II

Pennsylvania Bad Faith Statute, 42 Pa.C.S. § 8371

25. In that Paragraph 25 of Plaintiff's Complaint incorporates by reference Paragraphs 1 through 24 thereof, Highmark incorporates herein its responses thereto as set forth hereinabove.

26. No response is required to Paragraph 26 of Plaintiff's Complaint pursuant to the Order of Court dated February 1, 2005, dismissing Count II thereof.

27. No response is required to Paragraph 27 of Plaintiff's Complaint pursuant to the Order of Court dated February 1, 2005, dismissing Count II thereof.

SECOND DEFENSE

28. The services and supplies requested on behalf of Mr. Scheibler for his oral surgery were not covered benefits under the Plan.

THIRD DEFENSE

29. Highmark properly considered and reviewed the claims for coverage requested on behalf of Mr. Scheibler pursuant to the terms of the Plan.

FOURTH DEFENSE

30. Highmark paid for all covered expenses incurred by or on behalf of Mr. Scheibler to which he was entitled as a beneficiary of the Plan.

FIFTH DEFENSE

31. Plaintiff and/or Mr. Scheibler failed to provide adequate documentation to reverse the decision of Highmark that the services requested on behalf of Mr. Scheibler were covered benefits under the Plan.

NINTH DEFENSE

32. Plaintiff has failed to state a claim for which relief can be granted.

TENTH DEFENSE

33. Any cause of action which Plaintiff is attempting to assert other than a claim under ERISA is preempted by ERISA.

ELEVENTH DEFENSE

34. Plaintiff has waived any claims that she and/or Mr. Scheibler may have had and/or such claims are barred by the doctrine of laches.

TWELFTH DEFENSE

35. Plaintiff's claims are barred in part or wholly by the applicable statute of limitations.

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WHEREFORE, Defendant Highmark BlueShield demands that Plaintiff's Complaint be dismissed and that judgment be entered in favor of Highmark and against Plaintiff.

Respectfully submitted,

BPF

Gerri L. Sperling
Pa. I.D. No. 34603

Brian P. Fagan
Pa. I.D. No. 72203

SPRINGER BUSH & PERRY P.C.
Two Gateway Center, 15th Floor
Pittsburgh, PA 15222-1402
412-281-4900

Attorneys for Highmark BlueShield

27

Dated: February 16, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER and WILLIAM SCHEIBLER, her husband,

Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

No. 04-1928

Judge Hardiman

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HIGHMARK'S BRIEF IN OPPOSITION TO
PLAINTIFFS' PETITION FOR RECONSIDERATION

I. BACKGROUND

Plaintiffs commenced this action by filing a Complaint in Civil Action (the "Complaint"), on December 23, 2004. Plaintiffs allege in the Complaint that Plaintiff Donna Scheibler is an employee of ABB, Inc. ("ABB") and that she is enrolled as a beneficiary of ABB's health care benefits plan (the "Plan"). Plaintiffs further allege that her husband, Plaintiff William Scheibler ("William") is also entitled to benefits under the Plan. Plaintiffs' Complaint set forth two causes of action:

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Count I - Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1132(a)(1(B).

Count II - Pennsylvania Bad Faith Statute, 42 Pa.C.S.A. § 8371.

On January 13, 2005, Highmark filed a Motion to Dismiss Count II of Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the basis that the state law claim set forth therein

was completely and/or expressly preempted by ERISA. On February 1, 2005, this Court entered a Memorandum Opinion and accompanying Order dismissing Plaintiffs' state law bad faith claim in Count II of the Complaint, relying upon the recent decision of the Court of Appeals for the Third Circuit in *Barber v. Unum Life In. Co. of America*, 383 F.3d 134 (3rd Cir. 2004). As this Court noted, the *Barber* Court specifically held that sections 502(a) and 514(a) of ERISA preempt claims under the Pennsylvania bad faith statute, 42 Pa.C.S.A § 8371.

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On or about February 10, 2005, Plaintiffs filed their Petition for Reconsideration of the Court's Order of February 1, 2005, alleging, *inter alia*, that "two material issues of fact preclude dismissal with prejudice: 1) Whether the "draft" plan is qualified; and, if it is qualified, 2) Whether the plan offers procedures that afford a reasonable opportunity for full and fair review of dispositions adverse to claimants." Petition for Reconsideration, p. 3.

II. ARGUMENT

Plaintiffs claim that this Court's dismissal of Count II of the Complaint "cut off Plaintiffs [sic] right to a full and fair review of defendant's denial of medical insurance coverage." Petition for Reconsideration, ¶ 1.[1] Plaintiffs also argue that the Court erred in applying the holding of *Barber* to the facts of this action because that case "addressed a group, long-term disability insurance policy, purchased by the employer, a contract with specific coverage/exclusions language." Petition for Reconsideration, ¶ 9. Plaintiffs fail to explain, however, why the type of

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[1] Plaintiffs also set forth various allegations concerning the characterization of Highmark's coverage as "qualified", Highmark's basis for denial of coverage of benefits sought on behalf of Mr. Scheibler, and whether a "draft" plan provided by Highmark to Plaintiffs "controls" and offers procedures that afford a reasonable opportunity of review of benefits determinations. Highmark is unclear how these allegations are implicated by the Court's dismissal of Count II based upon ERISA preemption doctrines, and how they might be considered in order to effect a reconsideration of the Court's decision. Count I of Plaintiffs' Complaint, which was not dismissed, alleges a cause of action under ERISA, pursuant to which Plaintiffs may yet challenge Highmark's actions under the Plan.

benefits plan (long term disability in *Barber* vs. health care coverage in the case *sub judice*) precludes ERISA preemption of Pennsylvania's bad faith statute.

By seeking to distinguish *Barber* on this basis, Plaintiffs misapprehend the doctrine of ERISA preemption. The type of plan does not inform a preemption analysis; rather, the type of relief or remedy sought controls the applicable analysis. In *Aetna Health Inc. v. Davila*, 539 U.S. 986, 124 S.Ct. 2488 (2004), the United States Supreme Court considered whether the plaintiffs there, as ERISA plan participants or beneficiaries, could recover under a Texas statute for the defendants' alleged failures to exercise ordinary care in the handling of coverage decisions. The Court of Appeals for the Fifth Circuit had held that the remedies available under the Texas statute (the "THCLA") were not preempted by ERISA because preemption only applies where "'States . . . duplicate the causes of action listed in ERISA' and 'because the THCLA does not provide an action for collecting benefits' it fell outside the scope of § 502(a)(1)(B)." *Id.* at 2494, *quoting* *Roark v. Humana, Inc.*, 307 F.3d 298, 310-311 (5th Cir. 2002).

The Supreme Court disagreed, stating "interpretation of the terms of respondents' benefit plans forms an essential part of their THCLA claim, and THCLA liability would exist here only because of petitioners' administration of ERISA-regulated benefit plans. Petitioners' potential liability under the THCLA in these cases, then, derives entirely from the particular rights and obligations established by the benefit plans. . . . Hence, respondents bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA." *Aetna Health*, 124 S.Ct. at 2498.

Here, any alleged liability of Highmark derives solely from its coverage determinations made pursuant to the Plan. By attempting to state a claim under the Pennsylvania bad faith statute, Plaintiffs have not alleged a violation of a duty independent of ERISA. Simply stated, it makes no difference that the Plan at issue involves the provision of health care benefits and the plan in *Barber* involved long-term care benefits. It is the remedies available under Pennsylvania's bad faith statute that impermissibly conflict with and are expressly preempted by ERISA. In fact, *Aetna Health*, upon which the *Barber* Court relied, involved the denial of benefits under employee benefits health care plans similar to the one at issue here.[2] Thus, Plaintiffs' inexplicable argument that *Barber* is distinguishable on the basis that the type of employee benefit plan should control ERISA preemption doctrines is belied by the holding of *Aetna Health*.

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III. CONCLUSION

Plaintiffs have not offered any analysis or cited any authority for the proposition that *Barber* does not control here. Therefore, because Pennsylvania's bad faith statute is both conflict and expressly preempted by ERISA, this Court properly dismissed Count II of the Complaint.

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[2] The *Barber* Court, 383 F.3d at 138 n. 4, cited numerous District Court cases which found that Pennsylvania's bad faith statute was preempted by ERISA. These cases involved various employee benefit programs including those providing long-term disability, life insurance, retiree health care, and the following cases involving denials of coverage under health care plans like the one at issue *See, e.g., Nguyen v. Healthguard of Lancaster, Inc.*, 282 F.Supp.2d 296 (E.D.Pa.2003) *reconsideration denied* 03- 3106, 2003 U.S. Dist. LEXIS 22043 (E.D.Pa. Oct. 7, 2003); *Snook v. Penn State Geisinger Health Plan*, 241 F.Supp.2d 485 (M.D.Pa.2003; *Sprechter v. Aetna U.S. Healthcare, Inc.*, 2002 WL 1917711 (E.D. Pa. 2002).

WHEREFORE, Defendant Highmark Blue Shield respectfully requests that this Court enter an Order denying Plaintiffs' Petition for Reconsideration.

Respectfully submitted,

Gerri L. Sperling
Pa. I.D. No. 34603

Brian P. Fagan
Pa. I.D. No. 72203

SPRINGER BUSH & PERRY P.C.
Firm No. 271
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Pittsburgh, PA 15222-1402

412-281-4900

Attorneys for Defendant Highmark Blue Shield

Dated: 2/23/05

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CERTIFICATE OF SERVICE

I, Brian P. Fagan, hereby certify that the foregoing document was served by first class United States mail, postage prepaid, upon the following counsel of record:

Mary Ellen Chajkowski, Esquire
5510 Hobart Street
Pittsburgh, PA 15217

Brian P. Fagan

Dated: 2/23/05

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER and WILLIAM SCHEIBLER, her husband,

Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

No. 04-1928

Judge Hardiman

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RESPONSE TO PLAINTIFFS' MOTION FOR JUDICIAL RECUSAL

AND NOW, comes Highmark Blue Shield ("Highmark"), by and through its counsel, Gerri L. Sperling, Brian P. Fagan and Springer Bush & Perry P.C., and files the within Response to Plaintiffs' Motion for Judicial Recusal, stating as follows:

1. Plaintiffs filed their Motion for Judicial Recusal (the "Motion") on or about June 8, 2005.

2. Counsel for Highmark did not receive a copy of the Motion, although the Certificate of Service indicates service was made upon counsel on June 8, 2005. Counsel discovered the existence of the Motion by reference to it in a status report as to the instant action filed by Plaintiffs with the United States Court of Appeals for the Third Circuit.

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3. In their Motion, Plaintiffs seek recusal of Judge Thomas Hardiman, the federal court judge before which this case has proceeded.

4. Plaintiffs fail to set forth the legal basis or any facts in their Motion which would provide grounds for the recusal of Judge Hardiman.

5. Although not cited by Plaintiffs, the bases for the recusal of a federal judge are set forth at 28 U.S.C. §§ 144 and 455.[1]

6. Plaintiffs have not filed an affidavit as required by Section 144, therefore, recusal is not appropriate under this provision. Even if the Court considers the allegations set forth in Plaintiffs' Motion in place of an affidavit required by Section 144, such allegations would not provide sufficient grounds for recusal.

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7. "In evaluating a motion brought under [Section] 144, the 'test is whether, assuming the truth of the facts alleged, a reasonable person would conclude that a personal as distinguished from a judicial bias exists.'" *United States v. Talevski*, 188 F. Supp.2d 363, 369 (E.D. Pa. 2001), *quoting Mims v. Shapp*, 541 F.2d 415, 417. "As a rule, only allegations of personal bias and prejudice will suffice and the bias or prejudice must stem from an extrajudicial source." *Id.* (citations omitted). "Extrajudicial bias is 'bias not derived from the evidence or conduct of the

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[1] Section 144 provides:
Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. 28 U.S.C. § 144.

Section 455, provides, in pertinent part:
(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. 28 U.S.C. § 455.

parties that the judge observes in the course of the proceedings.'" *Schreiber v. Kellogg*, 838 F.Supp. 998, 1003 (E.D.Pa.1993), *quoting Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir.1980), *cert. denied*, 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 200 (1981)(citations omitted). An exception to the requirement that bias must stem from an extrajudicial source "requires disqualification when a judge displays 'pervasive bias' towards [the party seeking recusal] regardless of the source of the bias." *United States v. Rosenberg*, 806 F.2d 1169, 1174 (3d Cir.1986), *cert. denied*, 481 U.S. 1070, 107 S.Ct. 2465, 95 L.Ed.2d 873 (1987).

8. Recusal is inappropriate pursuant to Section 455, under which "[t]he applicable inquiry is whether a reasonable [person] knowing all the circumstances would harbor doubts concerning the judge's impartiality." *United States v. Vespe*, 868 F.2d 1328, 1341 (3d Cir.1989) (citations omitted); *see also United States v. Dalfonso*, 707 F.2d 757, 760 (3d Cir.1983). "This rule is limited by the 'extrajudicial source' doctrine, which warrants a judge's disqualification where the source of the partiality lies in knowledge gained outside the course of judicial proceedings." *Viola v. United States*, No. 99-586, 2003 WL 147779, at *1 (E.D. Pa. Jan 21, 2003), *citing Liteky v. United States*, 510 U.S. 540, 554- 56, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

9. Even accepting the allegations of Plaintiffs' Motion as true, they are insufficient as a matter of law. Plaintiffs make no statements or allegations based upon personal, or extrajudicial, bias. Thus, Plaintiffs fail to offer any facts or allegations that Judge Hardiman harbors personal or extrajudicial bias against them. Plaintiffs' allegations relate to prior rulings and actions taken by Judge Hardiman in the course of its participation in this case. In no way can Judge Hardiman's actions be construed to display a pervasive bias. Rather, as is demonstrated in the transcript of

proceedings that Plaintiffs attached to their Motion, Judge Hardiman made extraordinary efforts to explain and guide Plaintiffs' counsel in rudimentary procedural aspects of federal court practice. Plaintiffs' counsel has refused to accept such guidance, engaging instead in a series ill-advised filings of motions, petitions and appeals which ironically have thwarted an expeditious resolution of Plaintiffs' claims.

10. The examples of the Judge Hardiman's alleged bias are inane or incorrect as a matter of law. For instance, Plaintiffs claim that the Judge manifested his alleged bias by personalizing his remarks at hearings by using "you" and "your" when referring to Plaintiffs' counsel but properly addressed Defendant's counsel. Plaintiffs' hyper-sensitivity on this point would not be sufficient to require recusal under Sections 144 and 455, and, in any event, the Judge at times addressed Defendant and Defendant's counsel as "you", as well as referring to Plaintiffs as Plaintiffs. *See, e.g.*, Exhibit A to Plaintiffs' Motion, Transcript of March 10, 2005 proceedings, p. 5, line 2, line 17; p. 7, line 8, line 13; p. 8, line 12-16, lines 22-25; and Exhibit B, Transcript of April 25, 2005 proceedings, p. 2, line 9p. 6, lines 24-25; p. 8, line 7.

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11. Plaintiffs also complain that Judge Hardiman has not enforced the F.R.Civ.P. 26 initial disclosure requirement, which in the usual course would be required within 14 days of the rule 26(f) conference. However, Plaintiffs' improper appeals of the Court's interlocutory orders to the United States Court of Appeals for the Third Circuit warrants the abeyance of F.R.Civ.P. 26 disclosures. "It is well established that '[t]he filing of a notice of appeal ... confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" *Sheet Metal Workers' Intern. Ass'n Local 19 v. Herre Bros., Inc.*, 198 F.3d 391, 394 (3d Cir.1999) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)) (footnote omitted).

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12. All of the other examples of Judge Hardiman's so-called bias are likewise without merit. A review of such alleged biased actions demonstrate that they relate to prior rulings and actions made in the course of this case. Consequently, no reasonable person, knowing all the circumstances, would harbor doubts concerning Judge Hardiman's impartiality in this action.

13. As a result of Plaintiffs' failure to allege sufficient facts to prove that Judge Hardiman has a personal bias or prejudice against them, their Motion for Judicial Recusal must be denied.

WHEREFORE, Defendant Highmark Blue Shield respectfully requests that this Court enter an Order denying Plaintiffs' Motion for Judicial Recusal.

Respectfully submitted,

Gerri L. Sperling
Pa. I.D. No. 34603

Brian P. Fagan
Pa. I.D. No. 72203

SPRINGER BUSH & PERRY P.C.
Firm No. 271
Two Gateway Center, 15th Floor
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412-281-4900

Attorneys for Defendant Highmark Blue Shield

Dated: June 15, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER and WILLIAM SCHEIBLER, her husband,	
Plaintiffs,	No. 04-1928
v.	Judge Hardiman
HIGHMARK BLUE SHIELD,	
Defendant.	

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NOTIFICATION OF CHANGE OF ADDRESS

TO: CLERK OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Please be advised that the contact information of counsel of record for Defendants Highmark Inc. and Keystone Health Plan West d/b/a SecurityBlue has been changed as follows:

Gerri L. Sperling
Metz Lewis LLC
11 Stanwix Street, 18th Floor
Pittsburgh, PA 15222
(412) 918-1165

METZ LEWIS LLC

By: Gerri L. Sperling
Gerri L. Sperling
PA I.D. No. 34603

11 Stanwix Street, 18th Floor
Pittsburgh, PA 15222
412-918-1165
Attorneys for Defendants Highmark Inc. and
Keystone Health Plan West d/b/a SecurityBlue

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER,

Plaintiff,

v.

HIGHMARK BLUE SHIELD; and jointly Separately, or severally, KEYSTONE HEALTH PLAN WEST, d/b/a Security Blue,

Defendants.

No.

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DEFENDANTS' NOTICE OF REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA:

PLEASE TAKE NOTICE that the Defendants Highmark Blue Shield and Keystone Health Plan West, d/b/a SecurityBlue, removes this action to the United States District Court for the Western District of Pennsylvania on the following grounds:

1. This is an action filed and now pending in the Court of Common Pleas of Westmoreland County, Pennsylvania. The action was instituted by Plaintiff's filing a Complaint in Civil Action on or about October 4, 2005, which Complaint was docketed at No. 05-7642.

2. Defendants Highmark Blue Shield and Keystone Health Plan West were served with the Complaint in No. 05-7642 on October 17, 2005, which is less than 30 days before the filing of this Notice. A true and correct copy of the Complaint filed in the Court of Common Pleas of Westmoreland County, Pennsylvania, at No. 05-7642 is attached hereto as Exhibit "A".

3. As set forth in her Complaint, Plaintiff seeks payment of medical expenses for medical services provided to her husband under health coverage provided through Plaintiff's employer

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through an employee welfare plan. Although the Complaint purports to state claims under Pennsylvania law for specific performance, bad faith under 42 Pa.C.S.A. § 8371, unjust enrichment, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law, this action relates to an employee welfare benefit plan under the terms and conditions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*, and Plaintiff's state law claims are completely preempted by ERISA.

4. This Honorable Court has jurisdiction of this case pursuant to 28 U.S.C. 1331, 28 U.S.C. 1441, and 29 U.S.C. § 1132(a) and (e).

5. Defendants have this date given Plaintiff's attorney written notice of the filing of this Notice of Removal.

6. Defendants will also file a copy of this Notice of Removal and all related documents with the Prothonotary of the Court of Common Pleas of Westmoreland County as required by law.

WHEREFORE, Defendants respectfully request that this matter proceed in this Honorable Court as though originally commenced herein.

Respectfully submitted,

/s/ Gerri L. Sperling
Gerri L. Sperling
PA I.D. No. 34603

Kenneth S. Kornacki
Pa. I.D. No. 83739

METZ LEWIS LLC
11 Stanwix Street, 18th Floor
Pittsburgh, PA 15222
(412) 918-1100

Attorneys for Defendants Highmark Blue Shield and Keystone Health Plan West, d/b/a SecurityBlue

Dated: November 7, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER and WILLIAM SCHEIBLER, her husband,	
Plaintiffs,	No. 04-1928
v.	Judge Thomas M. Hardiman
HIGHMARK BLUE SHIELD,	
Defendant.	

DEFENDANT'S MOTION TO CONSOLIDATE WITH ACTION LISTED AT CASE NO. 05 - 1551

Pursuant to Federal Rule of Civil Procedure 42(a), Defendant Highmark Blue Shield ("Highmark"), through its attorneys, hereby moves this Honorable Court to consolidate this action, listed at Case No. 04-1928, with the matter filed by Plaintiff Donna Scheibler and removed to the United States District Court for the Western District of Pennsylvania listed at Case No. 05-1551.

I. INTRODUCTION

In what can only be described as a brazen attempt to make an "end-run" around this Court's prior ruling that dismissed the statutory "Bad Faith" claim as preempted under the Employee Retirement Income Security Act ("ERISA"), Plaintiff Donna Scheibler filed a second action in Pennsylvania state court in which she again raises the same claims of statutory bad faith against Highmark. Because the counts raised in the second action are also preempted by ERISA, Highmark removed the action to this Court, which action was assigned to Judge Hardiman and is now listed at Case No. 05-1551. With the second action now removed, the interests of justice and judicial

economy require that the two actions, which are based on the same set of operative facts and allegations, be consolidated for purposes of dispositive motions and ultimately, trial.

II. PLAINTIFFS' ACTION AT CASE NO. 04-1928 ALLEGED AN ERISA VIOLATION BASED ON HIGHMARK'S ALLEGED WRONGFUL REFUSAL TO PAY FOR MEDICAL TREATMENTS

1. Plaintiffs Donna Scheibler and William Scheibler commenced the action listed at Case No. 04-1928 (the "First Action") by filing a two-count Complaint against Highmark in this Court on December 23, 2004.[1] This action was assigned to the Honorable Thomas M. Hardiman.

2. In the First Action the Plaintiffs alleged a violation of ERISA, 29 U.S.C. § 1132(a)(1)(B) (Count I) and violation of Pennsylvania's Bad Faith Statute, 42 Pa.C.S.A. § 8371 (Count II). A true and correct copy of the First Complaint, without exhibits, is attached hereto as Exhibit A.

3. The First Complaint alleges that Donna Scheibler is an employee of ABB, Inc. ("ABB") and that she is enrolled as a beneficiary of ABB's health care benefits plan (the "Plan"). Plaintiffs further allege that her late husband, William Scheibler ("William") was entitled to benefits under the Plan. See First Complaint ("First Compl.") ¶ 4.

4. Plaintiffs allege that "[a]t all times relevant hereto, [Highmark] provided health care insurance pursuant to an employee benefit plan on behalf of the Plaintiff, Donna Scheibler." Id. ¶ 7.

5. According to the First Complaint, William was diagnosed with cancer for which he underwent radiation treatment in 1997. Id. ¶ 8. William's treating physician indicated that oral

[1] William Scheibler died in 2005 after the First Action was commenced. Neither William nor his estate is listed as a Plaintiff in the Second Action.

surgery was medically necessary to treat William's "radiation induced caries" condition, as a result of the radiation treatments administered for his cancer. Id. ¶ 9.

6. Plaintiffs claim that Highmark approved pre- and post-operative hyperbaric oxygen treatments to be performed in anticipation of William's oral surgery, but denied payment for the surgery itself. Id. ¶¶ 10-11. William proceeded with his surgery, negotiating a payment to the hospital that was far less than the actual billed charges set forth on later billing statements. Id. ¶ 16.

7. Plaintiffs seek to recover from Highmark damages they allegedly suffered as a result of Highmark's denial of benefits under the Plan to cover the costs of William's surgery.

8. On January 13, 2005, Highmark moved to dismiss Plaintiffs' cause of action for bad faith pursuant to Pennsylvania's Bad Faith statute, 42 Pa.C.S.A. §8371 (Count II) as completely and expressly preempted by §§ 502(a) and 514(a) of ERISA, 29 U.S.C. §§ 1132(a) and 1144(a).

9. On February 1, 2005, this Honorable Court entered a Memorandum Opinion whereby it granted Highmark's Motion to Dismiss. The Court held that Plaintiffs' count under the Pennsylvania Bad Faith Statute was "plainly barred under controlling law" and dismissed Count II of the First Complaint **with prejudice**. A true and correct copy of the Court's Memorandum Opinion and Order is attached hereto as Exhibit B.

10. The First Action is still pending before this Court on the lone, remaining count under ERISA (Count I).

III. DONNA SCHEIBLER FLOUTS THIS COURT'S ORDER OF DISMISSAL BY FILING A SECOND ACTION IN STATE COURT ALLEGING A CLAIM FOR BAD FAITH

11. On October 4, 2005, Donna Scheibler filed a Complaint against Highmark and Keystone Health Plan West, d/b/a Security Blue ("Keystone"), in the Court of Common Pleas of Westmoreland County, Pennsylvania (the "Second Action"). A true and correct copy of the Complaint filed in the Second Action is attached hereto as Exhibit C.

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12. Highmark and Keystone removed the Second Action to this Court on November 7, 2005, on the grounds that the Second Complaint was again based on the alleged denial of benefits and raised issues of ERISA preemption. Like the First Action, the Second Action was assigned to Judge Hardiman at Case No. 05-1551.

13. Although this Court previously dismissed, with prejudice, her count for bad faith under 42 Pa.C.S.A. §8371, Scheibler included the same count against Highmark in the Second Complaint. Scheibler also alleged counts for Specific Performance, "Dereliction of Duty to Deal in Good Faith," Unjust Enrichment, and Violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.

14. Like the ERISA count in the First Action, all of the alleged counts in the Second Complaint arise from Highmark's alleged wrongful refusal to pay for William's surgery, and are grounded in the same set of operative facts as the First Action.

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15. A plain reading of the Second Complaint confirms that many of the factual allegations that serve as the basis of the First Complaint were simply repeated in the Second Complaint. For example, Plaintiff alleges in the Second Complaint:

a. Donna Scheibler, as an employee of ABB, Inc., is enrolled as a beneficiary of the company's health care benefits plan. Plaintiff's family is entitled to the benefits of the health care plan. Second Compl. ¶ 4; (First Compl. ¶4).

b. Scheibler selected Highmark Blue Shield, from several offered to ABB employees, and makes co-payments with her employer. Second Compl. ¶ 5; (First Compl. ¶ 5).

c. Highmark and/or Keystone Health Plan West provided health care insurance pursuant to employee benefit plans on behalf of Scheibler. Second Compl. ¶ 7; (First Compl. ¶ 7).

d. Highmark covered and paid medical expenses related to Mr. Scheibler's cyst, a heart attack and stroke, tonsillar carcinoma and a radial dissection in 1997. Second Compl. ¶ 32 (First Compl. ¶ 8).

e. Mr. Scheibler's treating physicians wrote letters to Highmark stating that his need for oral surgery was medically necessary. Second Compl. ¶ 34; (First Compl. ¶ 9).

f. Highmark approved payment of Mr. Scheibler's pre-op and post-op, Hybperbaric Oxygen hospital treatments, done in preparation for surgery. Second Compl. ¶ 37; (First Compl. ¶ 10).

g. Highmark denied payment for Scheibler's surgery, schedule March 2004, in May 2004, an egregious delay, as the untimely denial based on unspecified

language. Second Compl. ¶ 41; (First Compl. ¶¶ 11, 13).

16. Count One of the Second Complaint seeks specific performance, which in effect, seeks payment of benefits under an ERISA plan, just as Defendants seek in their remaining count of the First Action presently pending before Judge Hardiman.

17. Highmark's time to respond to the Second Complaint has not elapsed as of the date of this Motion. However, Highmark intends to move to dismiss all counts, including the count for bad faith under 42 Pa.C.S.A. §8371, on the grounds of ERISA preemption.

IV. PLAINTIFFS' ACTIONS AGAINST HIGHMARK, WHICH ARE GROUNDED IN THE SAME OPERATIVE FACTS, SHOULD BE CONSOLIDATED IN THE INTERESTS OF JUSTICE AND JUDICIAL ECONOMY

18. Federal Rule of Civil Procedure 42(a), titled "Consolidation," provides: "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays."

19. Consolidation has been held to be appropriate when the two pending actions arise out of the same facts and seek the same basic relief. See Francesco v. White Tiger Transportation Company, Inc., 679 F.Supp. 456, 458 (M.D. Pa. 1988) (negligence action filed by the wife/passenger against trucking company charged with causing accident consolidated with earlier action filed by husband/driver).

20. Consolidation under Rule 42(a) is a "procedural device designed to promote convenience and economy in administration while avoiding duplicative litigation." Id.

21. Here, the interests of judicial economy and avoidance of what would clearly be duplicative litigation strongly support consolidating the two actions Plaintiffs have filed against Highmark. Both actions arise from Highmark's alleged wrongful denial of the payment for Mr. Scheibler's oral surgery. Evidence of the similarity of the two actions is found in the fact that many of the allegations Plaintiffs made in the First Complaint were simply repeated in the Second Complaint (see ¶ 15, infra).

22. Because of the similarity of the allegations and issues raised in the two actions, all of the discovery and trial issues in the actions will involve the same facts, time periods and witnesses. It would be wasteful and repetitive to require discovery to proceed on two separate fronts and would further be a misuse of judicial time and resources to require two separate trials on the two actions.

23. Second, because the causes of action raised in the Second Action are based on the same operative facts alleged in the First Action, and seek similar if not identical relief, the Second Action raises similar issues of ERISA preemption that this Court previously addressed and disposed of in the First Action.

24. Third, and perhaps the most compelling reason to consolidate these actions, is the fact that Plaintiffs are obviously attempting to by-pass this Court's prior Order that dismissed the statutory bad faith count raised in the First Action by filing the Second Action. Count III of the Second Complaint raises the identical claim under 42 Pa.C.S.A. §8371 that this Court dismissed in its Order dated February 1, 2005. In fact, Paragraphs 69 and 70 in Count III of the Second Complaint are verbatim reproductions of paragraphs 26 and 27 of the bad faith count that was dismissed from the First Action. Plaintiffs should not be able to manipulate the legal system in this manner, and consolidating the actions would serve to prevent such further tactics.

WHEREFORE, Defendant Highmark Blue Shield respectfully requests that this Court enter an Order consolidating this action with the action listed at Case No. 05-1551.

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Date: November 9, 2005

Respectfully submitted,

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